BANK OF COMMERCE BHD.

v.

PROMET DVPT. SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[ORIGINATING SUMMONS NO. D3-24-298-90]
14 JUNE 1991

CONTRACT: *Loan agreement cum assignment - Winding-up order made against borrower. Attempt by creditor to sell property charged - Consent of defendant whether condition precedent to effect sale - Whether defendant unreasonable in refusing consent. Whether assignment would have the effect of varying the terms of the contract.*

Malimex (M) Sdn. Bhd. sometime in May 1983 entered into a sale and purchase agreement with Promet Development Sdn. Bhd. for the purchase at RM2,409,675 of the premises known as Lot 8.01 on the 8th floor of Menara Promet that was at that time in the process of being constructed. By the terms of the agreement, the purchase price was to be paid in instalments progressively as the building was being erected.

The vendor, Promet, was to apply and obtain a subsidiary or strata title for the Lot and until the obtaining of such title and the formation of a Part 25 National Land Code management corporation, the purchaser Malimex, was by Clause 9 of the agreement, required to pay to the vendor a fixed monthly maintenance charge as well as a fixed proportion of the quit rent rates and assessment to be paid by the vendors in respect of the building and certain amounts in respect of the premium for fire insurance. Interest was to be paid on delayed payment.

The loan agreement cum assignment provides for the loan to be repaid in monthly instalments and on default the whole loan would become repayable and Clause 7 goes on to provide that the bank would be entitled to take possession of the Lot, to lease it and even to sell it to recover the amounts owing to the bank.

Promet purported to give its consent to the assignment by an endorsement to the loan cum assignment.

On 24 August 1988 a winding-up order was made against Malimex. The Official Receiver confirmed that the company was insolvent. There was owing to The Bank of Commerce Bhd. in respect of the loan secured by the assignment and accrued interest RM2,246,691.55 as at 30 March 1989. The bank obtained the leave of the Court to realise the amounts owing or as much of it that would be realised by a sale of the Lot 8.01. The Official Receiver had consented to a sale of the Lot to Sri Udaramas Holdings Sdn. Bhd. for RM2,079,930.

The bank recognised the need of the consent of Promet to effect the sale in view of Clause 20 of the sale and purchase agreement between Promet and Malimex. It wrote to Promet seeking the required consent. Promet was only prepared to give its consent upon payment to it of RM133,147.95 being arrears of maintenance charges as at 10 October 1990 payable to Malimex pursuant to the aforesaid Clause 9 of the sale and purchase agreement.

By an originating summons the bank sought the aid of the Court to compel Promet to deliver "an unconditional consent" to effect the proposed sale of the Lot.

The bank contended that Promet was unreasonably refusing to consent to the sale. It was submitted that while the bank was a secured creditor enjoying priority in that the assignment was a charge that had been duly registered with the maintenance charges and any other amounts due and owing to it by Malimex were unsecured debts in respect of which Promet had to share *pari pasu* with other creditors.

In the instant case Promet is not claiming that the bank had assumed the liabilities under the agreement of sale or otherwise is liable for the maintenance charges. It accepts that if anybody has to be sued for that it would be the assignor or those administering the estate of the assignor. It however, in effect, contends that the assignment is subject to and should be read with the sale and purchase agreement and that the assignment does not have the effect of varying the terms of the contract.

Held:

[1] It was clearly the intention of all the parties in the instant case including the bank that assignment of the "full and entire benefit of the sale agreement together with all the rights title and interest of the borrower therein" did not do away with the obligations undertaken by the borrower as purchaser as can be seen *inter alia* in the proviso to Clause 3 of the loan agreement cum assignment reproduced earlier in this judgment.

[2] It was a condition precedent to Promet giving its consent to a re-sale that it be satisfied that all obligations of the purchaser have been met and in particular the obligation to effect payment of all sums "whatsoever payable under (the) agreement."

[3] The assignee is not entitled to obtain performance of that which the purchaser assignor himself would not be entitled since the assignee's rights are merely derivative and accordingly the assignor bank must itself perform (if the purchaser assignor will not or cannot do so) such of the obligations of the purchaser as constitute the consideration for or matters precedent to the performance of the terms that the bank seeks to have performed for its own benefit.

[Application is dismissed with costs.]

Cases referred to:

Chung Khiaw Bank Ltd. v. Penang Garden Sdn. Bhd. [1990] 1 CLJ (Rep) 748 ***(dist)***
Mercantile Bank Ltd. v. The Official Assignee [1969] 2 MLJ 196 ***(foll)***

Legislation referred to:

Companies Act 1965, s. 108
National Land Code 1965, s. 218(1)

Other source referred to:

Equitable Remedies, Spry, 4th Edn., pp. 80, 81, 84

For the plaintiff - Surinder Singh; M/s. Mian Lee & Partners
For the defendant - Juliana Solomon; M/s. Rashid & Lee

JUDGMENT

VC George J:

Malimex (M) Sdn. Bhd. had on 23 May 1983 entered into a sale and purchase agreement with Promet Dvpt. Sdn. Bhd. for the purchase at RM2,409,675 of the premises known as Lot 8.01 on the 8th floor of Menara Promet that was at that time in the process of being constructed. By the terms of the agreement, the purchase price was to be paid in instalments progressively as the building was being erected.

The vendor, Promet, was to apply and obtain a subsidiary or strata title for the Lot and until the obtaining of such title and the formation of a Part 25 National Land Code management corporation, the purchaser Malimex, was by Clause 9 of the agreement, required to pay to the vendor a fixed monthly maintenance charge as well as a fixed proportion of the quit rent rates and assessment to be paid by the vendors in respect of the building and certain amounts in respect of the premium for fire insurance. Interest was to be paid on delayed payments.

Clause 11 of the agreement provides that until the subsidiary title to the Lot was transferred to the purchaser the purchaser occupied the Lot "as a licence of the vendor and by no other right."

Clause 12 provides that the vendor has to execute a registrable transfer of the strata title in favour of the purchaser or its assignee but *inter alia* only upon the purchaser having paid the total purchase price and all interest (if any) "and all other sum whatsoever payable under this agreement".

Clause 13 provides that if there is failure to pay any instalment of the purchase price or failure to pay any sums payable under the agreement within the time stipulated for such payment it shall be lawful for the vendor to annul the sale and to terminate the agreement and the vendor would thereupon be entitled to re-sell the Lot and to claim out of the sale proceeds *inter alia* all amounts outstanding due to the vendor under the agreement.

Clause 20 provides that the:

> purchaser shall not re-sell transfer or assign the rights duties and obligations under this agreement without the written permission of the vendor first had and obtained such consent not to be unreasonably withheld and provided that any transfer fee imposed by the vendor and the legal costs and expenses of such transfer or assignment (including the vendor's solicitor's costs) shall be borne absolutely by the purchaser.

Malimex needed to raise funds to pay off the outstanding balance of the purchase price of the Lot. It obtained a loan from the Bank of Commerce Bhd. and in consideration of the loan, entered into a loan agreement dated 10 November 1983, and by Clause 3 of the loan agreement purported to absolutely assign "to the bank the said property (that is, Lot 8.01) ... and the full and entire benefit of the sale agreement (that is, of 23 May 1983) together with all rights title and interest of the borrower herein."

There is a proviso to Clause 3 as follows:

> Provided always that notwithstanding the assignment herein before contained or any other provision of this agreement the borrower shall and hereby undertakes to pay all and any balance of the purchase price and other moneys payable under the provisions of the sale agreement and to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the borrower expressed or contained.

The loan agreement cum assignment provides for the loan to be repaid in monthly instalments and on default the whole loan would immediately be repayable and Clause 7 goes on to provide that the bank would be entitled to take possession of the Lot, to lease it and even to sell it to recover the amounts owing to the bank. It was expressly provided in respect of the above rights reserved to the bank that:

> the borrower shall and hereby expressly agrees covenants and undertakes to do and exercise all acts deeds instruments and things which the bank may require or stipulate for the purposes of effecting and or completing anything and or any transaction mentioned in this clause.

Clause 8 of the agreement provides for the borrower to keep the property in good repair and condition, to pay quit rent, assessment rate and taxes and all other damages payable to the government or local authority or statutory body and to keep the property insured. The proviso to Clause 8 provides that in the event the borrower defaults in making these payments the bank was entitled to make the necessary payments which amounts upon payment to be deemed advances to the borrower covered by the security provided by the assignment.

Promet purported to give its consent to the assignment by an endorsement to the loan cum assignment in the following terms:

> We, Promet Dvpt. Sdn. Bhd., hereby consent to the assignment of the said property as contained in Clause 3 herein and declare that the same has been duly noted in our records but shall not otherwise be deemed to be a party to or liable for the other provisions and representations contained herein. We hereby undertake that upon the issue of a subsidiary title to the said property and if at the date of such issue the bank shall remain the assignee of the sale agreement, we will deliver the said title to the bank.

On 24 August 1988 a winding-up order was made against Malimex. The Official Receiver confirms that the company is insolvent. There was owing to the Bank of Commerce Bhd. in respect of the loan secured by the assignment and accrued interest RM2,246.691.55 as at 30 March 1989. The bank obtained the leave of the Court to realise the amounts owing or as much of it that would be realised by a sale of the Lot 8.01. The Official Receiver has consented to a sale of the Lot to Sri Udaramas Holdings Sdn. Bhd. for RM2,079,930.

The bank recognised the need of the consent of Promet to effect the sale in view of Clause 20 of the sale and purchase agreement between Promet and Malimex. It wrote to Promet seeking the required consent. Promet was only prepared to give its consent upon payment to it of RM133,147.95 being arrears of maintenance charges as at 10 October 1990 payable to Malimex pursuant to the aforesaid Clause 9 of the sale and purchase agreement.

By this originating summons the bank seeks the aid of the Court to compel Promet to deliver "an unconditional consent" to effect the proposed sale of the Lot.

For the bank reliance was placed on *Chung Khiaw Bank Ltd. v. Penang Garden Sdn. Bhd.* [1990] 1 CLJ (Rep) 748 to contend that Promet was unreasonably refusing to consent to the sale. It was submitted that while the bank was a secured creditor enjoying priority in that the assignment was a charge that had been duly registered with the Registrar of Companies pursuant to s. 108 of the Companies Act, Promet's position *vis-a-vis* the maintenance charges and any other amounts due and owing to it by Malimex were unsecured debts in respect of which Promet had to share *pari pasu* with the other creditors.

The issue in *Chung Khiaw Bank Ltd. (supra)* was whether the assignee bank there (which was in a similar position to the bank in the instant case) liable to pay the arrears of maintenance charges. It was held that the liability of the purchaser assignor to pay maintenance charges (and interest arising therefrom) was not assigned to the assignee bank and that therefore the bank was not liable to pay the maintenance charges.

In the instant case Promet is not saying that the bank had assumed the liabilities under the agreement of sale or otherwise is liable for the maintenance charges. It accepts that if anybody has to be sued for that it would be the assignor or those administering the estate of the assignor. It however, in effect, contends that the assignment is subject to and should be read with the sale and purchase agreement and that the assignment does not have the effect of varying the terms of the contract.

Spry on *Equitable Remedies* 4th Edn. at p. 80 was referred to:

> Hence an assignment by a party to a contract does not operate to vary the content of the rights originally arising under that contract. This principle is of particular importance in those cases that involve agreements for the sale of land. Generally a contract of this kind is so construed that the purchaser is entitled to require the vendor to convey the land in question to anyone whom he nominates, including, of course, an assignee of the benefit of his contractual rights. Accordingly the assignee may obtain from a Court of equity an order directing the vendor to execute a conveyance to him, **provided that all the obligation of the purchaser have been complied with ...**

And at p. 81:

> Nonetheless, an assignee cannot succeed in an action for specific performance if under the contract in question there **remain unperformed obligations on the part of the assignor** which are personal in the appropriate sense and the performance of which cannot be sufficiently secured.

And at p. 84:

> A question sometimes arises whether if a party to a contract purports, not to assign generally the benefit of a contractual right, but rather to create a mortgage or to enter into a sub-sale of the property in question, the sub-purchaser or mortgagee can sue to enforce *in specie* the original contract ... But the sub-purchaser is not able to obtain performance to which the purchaser himself would not be entitled, since his rights are merely derivative, *and accordingly he must himself perform (if the purchaser will not do so) such of the obligations of the purchaser as constitute the consideration for, or matters precedent to, the performance of the terms that he seeks to have performed for his own benefit or advantage.*
> (Emphasis provided).

In Mercantile Bank Ltd. v. The Official Assignee [1969] 2 MLJ 196 title deeds had been deposited by a debtor with the applicant to secure a loan. Section 218 (1) of the National Land Code provides that the depositee of the title deed shall become entitled to a lien if he had registered a lien-holder's caveat. Before such a caveat could be registered the debtor was adjudged bankrupt. Raja Azlan Shah J as he then was, held (at p. 197-I) that at the time the act of bankruptcy was committed the depositee:

> had an equitable right to a lien and the trustee in bankruptcy who steps into the bankrupt's shoes, takes a title no better than him. He takes subject to the same equities as affected the property in the bankrupt's hands.

He went on to say (at p. 198-G):

> Under the bankruptcy law the trustee in bankruptcy is a statutory assignee who takes the bankrupt's property subject to the equities and liabilities which affect it ...

It was clearly the intention of all the parties in the instant case including the bank that assignment of the "full and entire benefit of the sale agreement together with all the rights title and interest of the borrower therein" did not do away with the obligations undertaken by the borrower as purchaser as can be seen *inter alia* in the proviso to Clause 3 of the loan agreement cum assignment reproduced earlier in this judgment.

It was a condition precedent to Promet giving its consent to a re-sale that it be satisfied that all obligations of the purchaser have been met and in particular the obligation to effect payment of all sums "whatsoever payable under (the) agreement".

It seems to me that the bank was not unaware of this to be the position. That is obviously why it had the borrower provide the covenant in relation to Clause 7 of the agreement and that is why there is Clause 8 and the proviso to it all of which have been referred to earlier herein.

In my judgment the assignee is not entitled to obtain performance of that which the purchaser assignor himself would not be entitled since the assignee's rights are merely derivative and accordingly the assignor bank must itself perform (if the purchaser assignor will not or cannot do so) such of the obligations of the purchaser as constitute the consideration for or matters precedent to the performance of the terms that the bank seeks to have performed for its own benefit.

The application has to be and is dismissed with costs.

Also found at [1992] 1 CLJ 395